



"Working to make Indiana businesses clean and safe, and wages fair and competitive."

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May 3, 2006

Re: The legal sufficiency and enforceability of wage scales adopted at  
Common Construction Wage Hearings in Indiana: The Department of  
Labor's position.

Dear School Superintendent or County Commissioner:

Many of the wage scales that are being presented by organized labor and adopted by wage committees around the state contain language that is outside the parameters of both the governing statute and the case law interpreting the same. The Indiana Department of Labor has worked diligently with legal representatives from organized labor over the past several months to arrive at a resolution of this issue and to adopt language and a common approach that meets the requirements of the law. To date, we have unfortunately been unsuccessful.

Pursuant to the authority granted me as the Commissioner of Labor to enforce and interpret the labor laws of the State, I am writing to inform you regarding the Agency's position with respect to the adoption of wage scales that fail to stay within the parameters of the law. As the Commissioner of Labor, I have broad legislatively-granted and discretionary authority to interpret and enforce the labor laws of the State of Indiana, including the common construction wage law; to dictate policy and procedure; and, to promulgate rules under Indiana's Administrative Code which further control and define the labor law's application. The Courts give great deference to the opinions and discretion of the Commissioner when interpreting the labor laws of the State. These powers can not be usurped by common wage committees. *See, e.g.* Indiana Code Sections 22-1-1-2; 22-1-1-8; 22-1-1-11; 22-1-1-16; 22-1-1-17; 22-1-1-18.

The subject language is contained in many of organized labor's proposed wage scales, usually found in "Sections C" and "D", and takes several different forms but usually reads as follows:

It is the committee's determination that semi-skilled and unskilled workers within the county are apprentices who are individually registered in a bona fide apprenticeship program as certified by the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training.

With the exception of laborers, the wage determinations for the classes of semiskilled and unskilled workers within the skilled trades represent the apprentice's progress in the apprentice program for that skilled classification in this wage scale as provided in the relevant apprentice program standards.

Apprentices are individuals employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training.

With the exception of laborers and ironworkers, the utilization of workers in the classes of semiskilled and unskilled, who have not been properly registered as apprentices within the meaning of the Bureau of Apprenticeship and Training regulations and the contract stipulations, is contrary to this wage scale. Such un-indentured workers shall be entitled to receive compensation at the skilled rate for that Classification.

Extraneous language, like that cited above, is outside the narrow authority granted a common construction wage committee and is unenforceable as a matter of law. Insofar as this language "mandates" the payment of skilled rates to unskilled workers, it is void and unenforceable. Insofar as this language attempts to make a "factual finding," binding on the Agency, that workers are covered by and are paid in accordance with apprenticeship programs within the county, the same is void and unenforceable.

The Agency has communicated this position to numerous committees and to representatives from organized labor over the past several months, but this language still appears in wage scales across the State. It is the Agency's policy not to enforce the language cited above, or any other extraneous language, but to give effect to the remaining portions of an otherwise valid wage scale.

The Agency's position is based upon a fair and balanced reading of both the statute and the cases interpreting the same. The statute has provided for many years a two step process that requires the setting of a specific wage for skilled, semi-skilled and unskilled classes. Indiana Code Section 5-16-7-1(c) clearly and definitively establishes the sole and exclusive powers and duties of a common construction wage committee:

- (c) As soon as appointed, the committee shall meet in the county where the project is located and determine in writing the following:
  - (1) A classification of the labor to be employed in the performance of the contract for the project, divided into the following three (3) classes:
    - (A) Skilled labor.
    - (B) Semiskilled labor.
    - (C) Unskilled labor.
  - (2) The wage per hour to be paid each of the classes.

*The Union Township School Corporation v. State of Indiana*, 706 N.E.2d 183, (Ind. App. 1998) case specifically found that:

[S]ection (c)(1), which provides that the committee shall determine “a classification of the labor to be employed in the performance of the contract for the project, divided into the following three (3) classes,” .... The plain and ordinary meaning of that phrase is that the committee must determine which trades or crafts will be utilized on the project. Further the legislature added the words “described in (c)(1)” to section (a) which now states that “for each class of work described in (c)(1) on the project a scale of wages” shall be paid.

[T]he common construction wage statute prescribes a two-step process. First the committee must classify the labor to be employed, that is, determine the trades or crafts to be utilized on the project. Then the committee must set wages for the skilled, semiskilled, and unskilled workers within each classified trade or craft. *Id.* at 190 (emphasis in original).

The law is established and clear. The committee’s responsibilities are narrow and defined. There are no other steps; no other powers granted the committee. The committee is not empowered to make broad findings of fact, but is limited in its authority to the narrow two step process envisioned by the General Assembly and interpreted by the courts.

No Indiana statute or case law grants the committee any legislative authority, nor are such committees de facto legislative bodies. The committees are not empowered to create policy or to attempt to circumscribe the authority of the Agency or the Commissioner. A committee is not empowered to act outside the authority narrowly prescribed to it by the statute and the cases interpreting the same. Extraneous language, attempts to issue policy, findings of fact or conclusions of law, language attempting to enforce apprenticeship programs, etc., “adopted” by a committee and attached to a wage scale are outside the narrow parameters of the two step process outlined by the courts and the statute and are as a consequence, unenforceable, non-binding on the Agency, void and have no legal effect.

Finally, organized labor has been introducing wage scales with multiple wages for *semiskilled classes in each classification*. Many of the committees around the State have been adopting wage scales with these multiple semi-skilled rates. It is the Agency’s position that this is contrary to the statute and the cases interpreting the same. These wage scales look something like this:

Bricklayers	Class	Hourly	Fringes
Journeyman	Skilled	\$24.80	\$9.77
4 <sup>th</sup> Year Apprentice	Semiskilled	\$23.56	\$9.77



3 <sup>rd</sup> Year Apprentice	Semiskilled	\$21.08	\$9.77
2 <sup>nd</sup> Year Apprentice	Semiskilled	\$16.12	\$9.77
1 <sup>st</sup> Year Apprentice	Unskilled	\$13.64	\$9.77

In an attempt to achieve a compromise with organized labor in late 2005, the Agency allowed these multiple semi-skilled rates to be adopted by committees. Further review of the controlling case law and discussions with legal counsel, however, led us to the conclusion that this attempt at compromise on the part of the Agency was itself incorrect. Therefore, beginning on June 1, 2006, the Agency will not enforce those parts of an otherwise valid wage scale that contain multiple wage rates for skilled, semi-skilled or unskilled classes. For lawful wage scales adopted prior to June 1, 2006, which include multiple semi-skilled rates or levels, the Agency will enforce such scales in the event of audits.

The Agency's determination is again based on the *Union Township* court's specific holding. The court determined that the statute requires "the Committee to determine three wage figures, including fringe benefits, for each individual trade or craft to be utilized on the project..... [T]he [trial] court concluded that the statute requires the Committee to determine a 'scale of wages' for each trade or craft to be used on the project, e.g. the Committee should set **one wage** for skilled carpenters, **one wage** for semiskilled carpenters and **one wage** for unskilled carpenters. We agree with the court's interpretation." *Union Township*, 706 N.E.2d 183, 189-190 (Ind. App. 1998) (emphasis added). The Agency agrees with both the trial court and the appellate court and will enforce the court's holding.

Those portions of an otherwise valid wage scale that contain multiple wages for skilled, semi-skilled or unskilled for any classification after June 1, 2006 will be considered void as a matter of law and will not be enforced by the Agency. Multiple wage scales for skilled, semi-skilled or unskilled under any classification are clearly contrary to the *Union Township* court's finding that "common" means the "arithmetic mode." *Id.* at 192, note 7. By definition there can be only one arithmetic mode for each skilled, semi-skilled and unskilled wage class established for each classification.

Below is an example of a wage scale that the Agency believes complies with both the statute and the case law interpreting the same:

[Beginning of example wage scale]

#### COMMON CONTRUCTION WAGE SCALE

**Date:**

**City:**

**County:**

**Project Description and Scope:**

We the undersigned common construction wage committee, appointed pursuant to Indiana Code 5-16-7 *et seq.*, do hereby fix and determine the following common construction wage scale to apply on the above referenced project.

Classification	Class	Hourly Rate	Fringes	Total:
Asbestos Workers	Skilled	\$	\$	\$
	Semiskilled	\$	\$	\$
	Unskilled	\$	\$	\$
Asbestos Abatement	Skilled	\$	\$	\$
	Semiskilled	\$	\$	\$
	Unskilled	\$	\$	\$
Boilermakers	Skilled	\$	\$	\$
	Semiskilled	\$	\$	\$
	Unskilled	\$	\$	\$

[Add classifications as required by the project]

\_\_\_\_\_  
Indiana State AFL-CIO Representative

\_\_\_\_\_  
Awarding Agency Representative

\_\_\_\_\_  
Governor's Representative

\_\_\_\_\_  
Taxpayer Named by Appointing Agency

\_\_\_\_\_  
Taxpayer Named by County Legislative  
Body

\_\_\_\_\_  
Date

[End of example wage scale]

This sample wage scale follows closely the dictates of statute and case law, does not contain extraneous language, specifically finds a wage rate for each classification, divided into skilled, semiskilled and unskilled classes; and does not contain multiple wage rates for skilled, semiskilled or unskilled. Any wage scale that substantially complies with this example will be fully enforced by the Agency.

We are sorry if the apparent disagreement regarding what the statute and the case law require has spilled over into any committee hearings and deliberations. The Agency is serious about its responsibility to interpret and enforce the State's labor laws in a fair and just manner. It is my hope that committees across the State will act in accordance with the law and the Agency's position statement contained herein. Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read 'M. Rivera', with a large, stylized flourish at the end.

Miguel R. Rivera, Sr.  
Commissioner